United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-2042

To be argued by
KARL SAVRYN

IN THE

United States Court of Appeals

For the Second Circuit

STANLEY ROTHSCHILD,
Petitioner-Appellant,

against

STATE OF NEW YORK, COMMISSIONER OF CORRECTIONAL SERVICES, HONORABLE GEORGE ROBERTS, Acting Justice of the Supreme Court of the State of New York, New York County,

Respondents-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR RESPONDENTS-APPELLEES

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BRIEF FOR RESPONDENTS-APPELLEES

Questions Presented

1. When a defendant, who is a police officer, testifies in his own behalf that his attempt to extort money from an alleged drug dealer was really in furtherance of his police duties, does the Fifth Amendment prevent the prose-

cution from asking two questions on cross-examination about whether the defendant offered this explanation to his superiors after his arrest?

2. Assuming such cross-examination was error, was the District Court correct when it found that the error was harmless beyond a reasonable doubt in view of the "overwhelming" proof of petitioner's guilt?

Preliminary Statement

Petitioner Stanley Rothschild appeals from an order of the United States District Court for the Southern District of New York (WERKER, D. J.), entered February 10, 1975, which denied his petition for a writ of habeas corpus. On March 10, 1975, Judge Werker granted a certificate of probable cause for appeal to this Court.

In 1970 Stanley Rothschild, a New York City police officer, assigned to the Narcotics Division, was indicted for extorting $6,000 from William Mathis, Sr., in October 1969 and for attempting to extort $8,000 from the same victim in December, 1969. At trial, Rothschild denied that he took any money in October 1969 and testified that in December, 1969 he had only been "playing along" with the alleged victim in order to arrest him for bribery. During cross-examination the prosecutor asked Rothschild two questions about whether he had told his story to his superior officers on the day of his arrest or afterwards. Rothschild replied "no."

On April 27, 1972, Rothschild was convicted by a jury in the Supreme Court, New York County, of grand larceny

in the first degree (by extortion) and attempted grand larceny in the first degree (by extortion) [N.Y. Penal Law §§155.40, 110/155.40]. On May 31, 1972 he was sentenced to two concurrent, indeterminate terms of imprisonment of up to four years.

The Appellate Division, First Department, unanimously affirmed Rothschild's conviction without opinion on May 24, 1973. (41 A.D.2d 1028). The judgment was unanimously affirmed by the New York State Court of Appeals [35 N.Y.2d 355 (1974)]. In an opinion by Judge Gabrielli, the court found that the two questions during cross-examination of Rothschild concerning his silence upon and after his arrest were proper because they bore on his credibility as a witness. The court reasoned that, in the specific circumstances of this case, Rothschild's post-arrest silence was a proper subject of impeachment because it was "patently inconsistent with the defense asserted" especially since, as a police officer, he had a "patent obligation" to report a bribe attempt. *Id.* at 360.

Petitioner remained free on bail pending appeal in the State courts. On January 6, 1975 Mr. Justice Thurgood Marshall denied petitioner's application for a stay pending application for certiorari and final determination by the Supreme Court. He began serving his sentence on January 20, 1975. Petitioner did not file for certiorari but instead petitioned for a writ of habeas corpus in the United States District Court for the Southern District of New York. In his petition, Rothschild contended, *inter alia,* that his constitutional rights under the Fifth and Fourteenth Amendments were violated when the prosecutor was al-

lowed to cross-examine him at trial about his post-arrest silence.

Judge Werker, in denying the petition, concluded that the cross-examination did violate petitioner's Fifth Amendment right to remain silent, but that the error was harmless beyond a reasonable doubt in view of the "overwhelming evidence of guilt" (5a).*

On appeal to this Court petitioner repeats his claim that his Fifth Amendment right to remain silent was violated. He argues that the alleged error was not harmless because the proof of his guilt was less than overwhelming.

STATEMENT OF FACTS

The People's Case

During October, 1969 Rothschild and three other police officers execute a search warrant at the residence of Mathis, Jr. and extort $6,000 from Mathis, Sr.

In 1969, Rothschild, who had been a member of the New York City Police Force for seven years, was assigned to plainclothes duty in the Narcotics Division (A: 425, 427).** On October 21, 1969, Rothschild and three other Narcotics Division police officers, with a search warrant, entered the apartment of Geraldine Williams, the common-law wife of William Mathis, Jr. The policemen said they were

* Numerical references followed by "a" are to petitioner's appendix filed in this Court.

** Numerical references preceded by "A" refer to petitioner's appendix filed in the New York State Court of Appeals which included the minutes of the trial and which is part of the record.

looking for someone with whom they had a shootout and asked if this was Mathis' residence. They searched the apartment and questioned Ms. Williams' six-year-old child. They then told Ms. Williams that they would send her to jail on a trumped-up charge and that she would lose her children and home unless she telephoned her father-in-law, William Mathis, Sr., and asked him to come to the apartment (A: Napolitano: 128, 133; Williams: 389-95).

Ms. Williams, very frightened, called Mathis, Sr. who came to the apartment. Rothschild told Mathis, Sr. that he had a warrant to arrest Mathis, Jr. for narcotic offenses, and that he had some evidence he could use to lock up Ms. Williams and take away her child. Rothschild demanded $6,000 for himself and his partners and threatened to arrest Ms. Williams if Mathis, Sr. did not comply. Mathis, Sr. agreed to meet the demand. He left the apartment and returned a short time later with $6,000. He handed the money to Rothschild who, after counting it, left with his partners (A: Mathis: 163-6, 171-8; Williams: 396).

During December, 1969 Rothschild tells Mathis, Sr. that his son will be arrested and shot unless Mathis agrees to pay $12,000.

On December 5, 1969 Rothschild and two other men tried to capture Mathis, Jr., but he escaped (A: Mathis: 80-3). The next day Rothschild came looking for Mathis, Jr. at Mathis, Sr.'s restaurant. Rothschild told Mathis, Sr. that the day before his son was in a car and tried to run down Rothschild and his partner. Rothschild said that he had a warrant to arrest Mathis, Jr. and that his partner was going to kill Mathis, Jr., if he was caught (A: Mathis: 189-93, 245-6).

However, Rothschild said he could "take care of it" and "smooth this thing over" (A: Mathis: 193-4) for a sum of money. Rothschild told Mathis, Sr. that his son was worth twice what he paid for his daughter-in-law and grandson and added that his son was going to be shot unless he agreed to pay. Mathis, Sr. needed some time to get the money so he and Rothschild agreed to meet the following Monday (A: Mathis: 193-6).

Mathis, Sr. informs the police; they record Rothschild's conversation and arrest him in possession of Mathis' marked money.

On December 10, 1969 Mathis, Sr. went to the police and told superior officers about the events of October 21st and December 6th. (A: 203-4). Mathis returned to his restaurant the same day and was met by Rothschild and another police officer. Mathis said that he did not have the $12,000 but that he could get it in "pieces". They agreed to meet the following evening, December 11th, when the first payment would be made (A: Mathis: 196-210, 212-13).

Mathis returned to the police. They gave him $280 in marked bills, placed recording devices in his restaurant and secreted several police officers there (A: Mathis: 217-19, 311-12, 319; Bishop: 319, 323-4; Maduro: 346). Rothschild arrived, and his conversation with Mathis was recorded on tape [This tape (People's Exhibit 11) was played to the jury which also had a transcript (People's Exhibit 14)].

During the conversation Mathis said that having paid $6,000 two months ago, he could not now raise $12,000.

He asked Rothschild if he was amenable to instalment payments. Rothschild offered a compromise: he would accept $8,000 instead of $12,000 but only if the $8,000 would be paid in a lump sum. That payment would exempt Mathis from being "bothered for another year or two." Rothschild wanted to be "fair" especially since he did not want to risk the danger of making a series of trips to collect payments. Rothschild also reminded Mathis that he had "covered" the October search warrant by arresting another person (A: Mathis: 227-32, 265; Transcript of tape recording, People's Exh. 14).

Mathis handed the $280 to Rothschild and gave a prearranged signal. The police officers who were hiding in the restaurant came out and arrested Rothschild (A: Maduro: 348-9, 378, 383).

The People's proof rested upon the testimony of Geraldine Williams, Mathis, Sr., Mathis, Jr., one of defendant's police partners, the arresting officers and the recorded conversation between defendant and Mathis, Sr.

The Defense

Stanley Rothschild testified in his own behalf as follows: On October 21, 1969, he had executed a search warrant for narcotics inside Mathis, Jr.'s apartment but he did not extort any money from Mathis, Sr. According to Rothschild, Mathis, Sr. was not called and did not appear that day (A: 428-9, 437, 484, 548).

On December 6, 1969 he went to Mathis, Sr.'s restaurant looking for his son. The day before Mathis, Jr. had tried

to run him down in a car when he was trying to execute another warrant to search for narcotics. Rothschild never asked for any money; nor was any offered (A: 441-6, 449, 538-9).

The next day Mathis, Sr. called, and Rothschild went to see him a few days later. Mathis wanted to "straighten" things out. He asked Rothschild to make an offer. Rothschild said $12,000 (A: 453, 539, 543). Rothschild explained on cross-examination that he did not really want Mathis to accept the offer. This "ridiculous" figure was chosen because Rothschild did not believe Mathis "would go for it" (A: 545-6). He also said that he was interested in arresting Mathis for bribery because he was a major drug peddler (A: 547). Mathis agreed to pay the $12,000 and told Rothschild to return the next day, which Rothschild did.

The next day Mathis offered Rothschild a $300 down payment (A: 456) but Rothschild refused to take it, because he thought that if more money was offered it would amount to a felony. He thought that "more money would be more convincing that this man [Mathis] tried to bribe me" (A: 513, 551-3).

Nonetheless, Rothschild did take the money in order to place Mathis under arrest (A: 555). Before he could draw his gun to arrest Mathis, Rothschild himself was arrested (A: 460).

According to Rothschild the tape recording of his conversation with Mathis was incomplete and out of context (A: 457). He did not, however, say what was missing.

POINT I

The prosecutor could properly ask Rothschild about his silence upon and after his arrest in order to impeach his credibility [answering petitioner-appellant's brief, Point I].

Rothschild's defense to the attempted extortion in December was that he had been acting in his official capacity as a police officer. When Mathis offered the bribe on December 10th, Rothschild simply played along so that he could arrest Mathis, a major drug dealer, for bribery. Rothschild met Mathis the next day to receive the money. After the money was passed, Rothschild was about to draw his gun and arrest Mathis for bribery when, instead, he was arrested by other police officers.

Without objection the prosecutor asked Rothschild whether he informed his superiors of the bribe offer either on the day it was made, December 10th, or the next day before going to Mathis' restaurant. Rothschild conceded he had not (A: 549-50). The prosecutor then asked Rothschild the following two questions:

> After you were arrested on December 11th, did you tell any superior officers or anybody [objection overruled] that you were an innocent man just trying to get this drug peddler on a charge of bribery, did you ever tell anybody that? [objection overruled]

and

> In the last twenty-eight months, did you ever tell anybody in the Police Department ranking police officers, that you have got me all wrong, I was just trying

> to get this drug peddler and lock him up on a charge of bribery, did you ever tell that to anybody? [objection overruled] (A: 550-1)

Rothschild answered "no" in response to both questions. The prosecutor asked no further questions on this subject. In his summation, the prosecutor made no reference to the defendant's failure after his arrest to tell his exculpatory story to his fellow officers. And no such reference was made by the court when it marshalled the evidence.*

Rothschild contends that requiring him to answer these two questions on cross-examination violated his Fifth Amendment right to remain silent. However, the jury has an obligation to determine the whole truth. Rothschild's prior silence, which he admitted in response to these two questions, was patently inconsistent with the exculpatory explanation he gave when he testified at the trial. Permitting the jury to hear this inconsistency allowed it accurately to assess Rothschild's reliability as a witness.

Police officers, of course, have an obligation to report bribe offers. And certainly they have an obligation to report when they have accepted a bribe in order to make an arrest. These obligations are inherent in the nature of a police officer's job. If a police officer is arrested he may no longer have any legal obligation to speak and explain

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* Petitioner implies in his brief (p. 11) that in his summation the prosecutor emphasized Rothschild's post-arrest silence. However, the comment (quoted at p. 11 of petitioner's brief) when read in context clearly refers to Rothschild's failure to notify his superiors about the bribe offer and about his plan *before* he was arrested. This comment is unobjectionable, and indeed, there was no objection to it (A: 596-7). The New York State Court of Appeals also noted that the prosecutor did not mention Rothschild's post-arrest silence during summation. 35 N.Y.2d at 359.

his conduct. However, because of his status as a law enforcement official, it would be quite unnatural for him not to offer an explanation. For example, suppose an undercover police officer makes a "buy" of narcotics and is arrested by other officers who do not know he is also a police officer. He would have a strong impulse, based in part on his professional status, to explain that he was acting in his official and lawful capacity. It would be strange indeed, and most certainly inconsistent, for the undercover agent to remain silent after his arrest and make his explanation for the first time at trial.

Similarly, any innocent police officer in Rothschild's circumstances would have explained that he was taking the money in order to arrest Mathis. Rothschild's failure to do so at the time of and after his arrest was patently inconsistent with his trial defense of "good intentions."

The prosecutor properly sought to show this inconsistency, which obviously bore on Rothschild's credibility as a witness, to the jury. In light of *Harris* v. *New York*, 401 U.S. 222 (1970), the cross-examination was permissible.*

* Two circuits have relied upon *Harris, supra,* and held that it was proper to impeach a defendant's credibility as a witness by cross-examining him about his silence after arrest. See *United States* v. *Fairchild,* —— F.2d —— (5th Cir. 1975), 16 CrL 2344; *United States* v. *Ramirez,* 441 F.2d 950 (5th Cir. 1971), *cert. denied* 404 U.S. 869 (1971); *Agnellino* v. *New Jersey,* 493 F.2d 714 (3d Cir. 1974); *United States ex rel. Burt* v *State of New Jersey,* 475 F.2d 234 (3d Cir. 1973); *contra*: *United States* v. *Hale,* 498 F.2d 1038 (D.C. Cir. 1974), *cert. granted* 43 U.S.L.W. 3325; *Johnson* v. *Patterson,* 475 F.2d 1066 (10th Cir. 1973). This question was raised on appeal in this circuit in *United States* v. *Cecil Grafton Rose,* 500 F.2d 12, 17 (1974). However, this Court determined that defendant waived whatever right he might have had by failing to object at trial to the use of his post-arrest silence for impeachment purposes.

Judge Werker, in finding that the prosecutor's cross-examination

(footnote continued on next page)

In *Harris, supra,* the United States Supreme Court held that a defendant's prior inconsistent statements may be used to impeach his credibility at trial even if these prior statements were obtained in violation of *Miranda* v. *Arizona,* 384 U.S. 436 (1966); *see also Oregon* v. *Hass,* —— U.S. ——, 16 CrL 3120 (March 19, 1975).* As the Court said in *Harris* (401 U.S. at 224-5):

> It does not follow * * * that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes * * *. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did not more than utilize the traditional truth-testing devices of the adversary process.
>
> * * *
>
> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury * * * by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (*Id.* at 225-6.)

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was error (although harmless), relied upon *United States* v. *Hale,* 498 F.2d 1038 (D.C. Cir. 1974), *cert. granted,* 43 U.S.L.W. 3325. However, in *Hale* there was some question about whether the defendant's silence was in fact inconsistent with his trial testimony. In contrast, the inconsistency in the instant case is clear. Similarly, *Grunewald* v. *United States,* 353 U.S. 391 (1957) is also inapplicable. There cross-examination of a defendant concerning his refusal to answer questions before a grand jury was held to be error. However, as the Court found (353 U.S. 421-2) there was no inconsistency between the refusal to answer questions before the grand jury and defendant's assertion of innocence at trial.

* In *Oregon* v. *Hass, supra,* the defendant was given adequate warnings pursuant to *Miranda.* Then he asked for an attorney. The police persisted in questioning him and elicited responses which were later used to impeach his credibility at trial. The Supreme Court reaffirmed the principles set forth in *Harris* and found no violation of the Fifth Amendment.

In its terms, *Harris* dealt with "prior inconsistent utterances." But there is no reason, either in logic or in policy, why the principles enumerated in *Harris* should not also apply to prior inconsistent "non-utterances," as in this case. *Harris* recognizes that when a defendant chooses to testify, he places his credibility before the jury. The jury's search for the truth should not be frustrated by a defendant who lies in his own defense and then is allowed to prevent the prosecutor from asking relevant questions concerning prior inconsistencies.

When Rothschild voluntarily took the stand, he was obligated to speak truthfully and accurately. He became subject to the "traditional truth-testing devices of the adversary process" (401 U.S. at 225). By showing the patent inconsistency between Rothschild's trial testimony and his failure to explain his actions to his superiors upon and after his arrest, the prosecutor was doing nothing more than using one of these "traditional truth-testing devices." The jury was certainly entitled to know of this patent inconsistency in order correctly to assess the defendant's credibility.

Rothschild's right to remain silent upon arrest was not impermissibly burdened or penalized by the prosecutor's cross-examination. True, if cross-examination like this is permitted, a defendant who must decide whether to speak or be silent after his arrest will have to weigh the following possibilities: if he is silent, and if there is a trial, and if he testifies at trial in his own defense, and if his testimony at trial is inconsistent with his silence, then the prosecutor may be allowed to ask for an explanation of his previous silence, which may or may not satisfy a jury. It is ex-

tremely unlikely that speculative considerations like these would actually deter anyone from remaining silent after his arrest if he were otherwise inclined not to speak.

However, even if allowing cross-examination about prior silence would place some "burden" on the defendant's choice to remain silent when he is arrested, it does not follow that this burden is impermissible. Defendants in criminal cases have to make choices about asserting their constitutional rights all the time. Their choices are almost never "free." They almost always place a "burden" or a "penalty" on constitutional rights. Yet the Supreme Court has consistently upheld the legitimacy of requiring defendants to make such choices when the consequences of the choice were far more onerous than the ones involved here.

For example in *McGautha* v. *California*, 402 U.S. 183, 210-13, 217 (1971), the defendant was faced with the following dilemma: Under the state's trial procedure, guilt and punishment in capital cases were determined by the same jury in a single proceeding. If the defendant testified, he could not limit his testimony to the issue of punishment; he would have to testify on the issue of guilt as well. If the defendant chose to remain silent, he lost his opportunity to be heard on the issue of punishment. Yet the Supreme Court found that a defendant's right to remain silent was not unconstitutionally burdened by this unitary trial procedure.

In *Williams* v. *Florida*, 399 U.S. 78, 83-4 (1970), the defendant was faced with a state statute which precluded the introduction of alibi evidence at trial unless the defendant provided the prosecution with the names of his alibi witnesses before trial. The defendant complied with the notice-

of-alibi rule, and the prosecutor used a deposition of the defendant's alibi witness to impeach the witness's testimony. The defendant claimed that his privilege against self-incrimination was violated because, in order to avoid forfeiting his right to present his alibi defense, he was compelled to furnish the prosecution with information useful in convicting him. Yet the Supreme Court found that the statute did not unconstitutionally burden the Fifth Amendment privilege, despite the fact that the statute compelled the early disclosure of defense evidence which could be used against the defendant at trial. *See also e.g., Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970); *Parker* v. *North Carolina*, 397 U.S. 790 (1970).

Furthermore, when Rothschild chose to testify he waived the Fifth Amendment privilege with respect to all matters relevant to the issues at trial, including that of his credibility:

> [An accused's] voluntary offer of testimony upon any fact is a waiver as to *all other relevant facts* because of the necessary connection between them all. *Any* voluntary disclosure by the accused * * * distorts the probative picture. * * * The accused has the choice at the outset [whether or not to take the stand], unhurried and with full knowledge that all questions will relate to his incimination [8 Wigmore, *Evidence*, §2276, pp. 459-60 (McNaughton rev. ed. 1961) (original emphasis)].

As the Supreme Court has said explicitly: "His [the accused's] waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." *Raffel* v. *United States*, 271 U.S. 494, 497 (1926).

Once on the stand, a defendant may not seek refuge in the Fifth Amendment privilege to prevent damaging impeachment material from being introduced. He "may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events"—such as his prior silence—"* * * without subjecting his silence to the inferences to be naturally drawn from it." *Caminetti* v. *United States*, 242 U.S. 470, 494 (1916); *see also Walder* v. *United States*, 347 U.S. 62 (1954); *Spencer* v. *Texas*, 385 U.S. 554 (1966). For "the safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Raffel, supra* at 499.*

Finally, *Miranda* v. *Arizona, supra*, should not be read to support the claim of a Fifth Amendment violation in this case in spite of some broad dictum in a footnote.** The main point of *Miranda* was to deter police from impermissibly coercing arrestees during custodial interrogation. As the Court observed in *Harris* (401 U.S. at 225) sufficient

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* Since the Fifth Amendment is aimed at protecting the defendant who does not choose to testify in his own behalf, the rationale of *Griffin* v. *California*, 380 U.S. 609 (1965) (where the prosecutor's comment about the defendant's failure to testify was held to violate the Fifth Amendment) is inapplicable to this case. Here we are dealing with the testifying defendant who chooses to waive his privilege and not with the non-testifying defendant, as in *Griffin*, who chooses to stand by his privilege.

** . . . [I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. *Miranda* at 468 n.37.

As the dissent points out in *Hale, supra* at 1047, this dictum applies, if it applies at all, to a situation in which the defendant stands mute in the face of active interrogation by police. Here, Rothschild's silence did not follow any police interrogation.

deterrence is provided when the improperly obtained evidence cannot be used in the prosecution's direct case. But "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense." *Harris*, *supra* at 226.

In finding that the prosecutor's cross-examination was error (although harmless), Judge Werker relied upon the fact that because of the trial court's restrictive ruling, Rothschild was prevented from presenting his defense of "good intentions" "in any but the most indirect manner" during his direct testimony (8a); it was during cross-examination that Rothschild was able to communicate clearly what his state of mind had been when he took the money from Mathis. It may be, as Judge Werker said, that the prosecutor should not be able to "bootstrap." In other words, he should not be allowed to elicit testimony on cross-examination which the defendant did not want to, and never intended to, give in his direct case, and then use prior silence to contradict this testimony. However, that is not what happened here.

Here the defendant intended, and in fact attempted, to present his defense of "good intentions" on direct examination. He was hampered by the trial court's rulings. Since Rothschild had wished to present this defense during his direct case, it should make no difference that he got his full opportunity during cross-examination. He clearly wanted to present this testimony; he did so; and his prior silence was inconsistent with it.*

* Moreover, by allowing such exculpatory testimony to come out during cross-examination, the prosecutor cured any possible error which may have arisen due to the trial court's restrictive rulings during defendant's direct case. See petitioner's brief, p. 15.

POINT II

Even if the cross-examination was not proper, any error was harmless beyond a reasonable doubt because Rothschild's guilt was proved overwhelmingly and the jury would have convicted him regardless of his answers to the two questions [answering petitioner-appellant's brief, Point II].

The New York State Court of Appeals unanimously affirmed petitioner's conviction in an opinion which said that "the record reveals overwhelming evidence of the defendant's guilt." 35 N.Y.2d at 359. Judge Werker, in denying the habeas corpus petition, also found that "the record reveals overwhelming evidence of Rothschild's guilt" (5a). Despite the concurrence of these tribunals, Rothschild claims once again that evidence of his guilt was not overwhelming. Rothschild refers this Court to conclusory statements made by his counsel in various affidavits, motions, and briefs filed during litigation (38a-56a). However, the evidence clearly supports the conclusions reached by the New York State Court of Appeals and by Judge Werker.

Proof of Rothschild's guilt was overwhelmingly established by the testimony of Geraldine Williams, Mathis, Jr., Mathis, Sr., and the arresting officers who overheard the December 11th conversation between Rothschild and Mathis, Sr. The tape recording of the December 11th conversation corroborated the other testimony about that conversation, confirmed the October 21st extortion (see 35 N.Y.2d at 358

fn. 2), and clearly showed that Rothschild was "shaking down" Mathis in December.

Petitioner argues that the tape recording was inaudible and ambiguous. This same argument was made by him in the State appellate courts and in the District Court, and was rejected for good reason. The State trial court properly determined that the tape was for the most part audible and therefore admissible.*

In short, assuming that the prosecutor's two questions were improper, any error was harmless beyond a reasonable doubt because, as Judge Werker correctly concluded, the proof of guilt was overwhelming and the jury would have convicted Rothschild regardless of his responses to the two questions. *See Chapman* v. *California*, 386 U.S. 18 (1967).**

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* A pretrial hearing was held in which the trial court, after hearing the tape twice, concluded that most of the tape was audible (p. 17 in original minutes of trial; A: 359-60); *see United States* v. *Knohl*, 379 F.2d 427, 440 (2d Cir. 1967), *cert. denied*, 389 U.S. 973 (1967). Also, with the prosecutor and defense counsel, the trial court carefully reviewed and edited the written transcript of the tape (A: 16-24), and instructed the jury on the proper use of the tape recording in determining guilt or innocence (A: 632-4).

** It should be noted that after Rothschild was sentenced in this case, he testified at the trial of his co-defendant, Vito Alongi, and was given a grant of immunity from further prosecution under the indictments in the case at bar.

Conclusion

The order appealed from should be affirmed.

Respectfully submitted,

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May, 1975

Service of 2 copies of the within Brief is hereby admitted this 8th day of May 1975

Signed [signature]

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